SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 412

AUBRY WILLIAMS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent

N WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Questions presented	2
Statement of the case	3
Summary of argument	6
Argument:	
1. This Court has jurisdiction to determine whether there has been a waiver of the federal constitutional claim	8
2. Petitioner's constitutional claim should not be considered waived under the unique circumstances of this case	10
a. The capital nature of this case	12
b. The substantiality of petitioner's constitutional claim	13
c. The futility of a timely challenge	18
d. Practical considerations	26
Conclusion	27
Appendix	28

CITATIONS

Cases:

Aetna Ins. Co. v. *Kennedy*, 301 U.S. 389	13
Akins v. *Texas*, 325 U.S. 398	15
Avery v. *Georgia*, 345 U.S. 559	5, 13, 14, 19
Avery v. *State*, 209 Ga. 116, 70 S.E. 2d 716,	6, 7, 11, 14, 18, 21
Bowen v. *Johnston*, 306 U.S. 19	8, 23
Brown v. *Allen*, 344 U.S. 443	12
Bute v. *Illinois*, 333 U.S. 640	9
Callan v. *Wilson*, 127 U.S. 540	23
Carter v. *Illinois*, 329 U.S. 173	9
Carter v. *Texas*, 177 U.S. 442	16
Creswill v. *Grand Lodge Knights of Pythias*, 225 U.S. 246	10
Davis v. *O'Hara*, 266 U.S. 314	10
Davis v. *Wechsler*, 263 U.S. 22	6, 10

Page

Ex parte Bain, 121 U.S. 1 23
Ex parte Wilson, 114 U.S. 417 23
Glasser v. *United States*, 315 U.S. 60 ..... 7, 13
Hans Nielsen, Petitioner, 131 U.S. 176 23
Johnson v. *Zerbst*, 304 U.S. 458 ..... 13, 23
Martin v. *Texas*, 200 U.S. 316 16
Moore v. *Dempsey*, 261 U.S. 86 17
Ohio Bell Tel. Co. v. *Public Utilities Commission*, 301 U.S. 292 13
Parker v. *Illinois*, 333 U.S. 571 ..... 6, 9
Parks v. *State*, 204 Ga. 41, 48 S.E. 2d 837 26
Patterson v. *Alabama*, 294 U.S. 600 ..... 6, 8, 10, 23, 24
Pierre v. *Louisiana*, 306 U.S. 354 ..... 7, 13, 15
Rogers v. *Alabama*, 192 U.S. 226 9
Smith v. *Texas*, 311 U.S. 128 16
Strauder v. *West Virginia*, 100 U.S. 303 ..... 7, 15, 16
Sunal v. *Large*, 332 U.S. 174 ..... 8, 22
Truax v. *Corrigan*, 257 U.S. 312 ..... 6, 9
Union Pacific R. Co. v. *Public Service Commission*, 248 U.S. 67 9
United States v. *340 Acres of Land*, 54 F. Supp. 457 (S.D. Ga.) 27
United States v. *Trollinger*, 81 F. 2d 167 (C.C.A. 4) 27
Walker v. *Johnston*, 312 U.S. 275 23
Ward v. *Love County*, 253 U.S. 17 10
Watkins v. *State*, 199 Ga. 81 4
Williams v. *State*, 210 Ga. 207, 78 S.E. 2d 521 ..... 3, 19

Constitutional provisions and statutes:

Constitution of the United States, Fourteenth Amendment, Section 1 28
Constitution of the State of Georgia, Article I, Paragraph V 15, 28
Georgia Code Annotated, Section 59-801 28
Georgia Code Annotated, Section 59-802 28
Georgia Code Annotated, Section 59-803 29
Georgia Code Annotated, Section 59-805 29
Georgia Code Annotated, Section 70-204 29
Georgia Code Annotated, Section 70-205 ..... 5, 29

Page

Georgia Code Annotated, Section 70-208 26, 30
Georgia Code Annotated, Section 70-301 3, 30
Georgia Code Annotated, Section 70-303 3, 30
United States Code Annotated, Title 18, Section 243 15

Miscellaneous:

Boskey and Pickering, Federal Restrictions on State Criminal Procedure, 13 Univ. of Chicago L. Rev. 266 (1946) 24

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Opinions Below

The opinion of the Supreme Court of Georgia (R. 19-22) affirming the dismissal of petitioner's extraordinary motion for new trial is reported in 210 Ga. 665, 82 S. E. 2d 217. The judgment of the Superior Court of Fulton County (R. 16) dismissing that extraordinary motion is unreported. The earlier opinion of the Supreme Court of Georgia affirming petitioner's conviction of the offense of murder, which opinion is not drawn in question here, is reported in 210 Ga. 207, 78 S. E. 2d 521.

Jurisdiction

The petitioner has invoked the jurisdiction of this Court under 28 U. S. C. 1257(3) on the theory that the judgment below, dismissing the extraordinary motion for new trial and refusing to adjudicate petitioner's claim that he had been denied the equal protection of state laws, has deprived petitioner of a right or privilege claimed under the federal Constitution. The judgment of the Supreme Court of Georgia was entered on May 10, 1954 (R. 23), and a motion for rehearing was denied by an order dated May 31, 1954 (R. 23). The petition for a writ of certiorari was filed on July 9, 1954, and was granted by this Court on October 18, 1954 (R. 23).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States; Article I, Paragraph V, of the Constitution of the State of Georgia; and Sections 59-801, 59-802, 59-803, 59-805, 70-204, 70-205, 70-208, 70-301 and 70-303 of the Georgia Code Annotated. They are printed in the appendix to this brief, *infra*, pp. 28-31.

Questions Presented

1. Whether this Court has jurisdiction to examine the circumstances surrounding the assertion of the federal question, the state court below having held that the assertion came too late under established rules of state procedure.

2. Whether petitioner's failure to assert his federal constitutional claim at the point prescribed by state procedure should be construed, for purposes of the federal Constitution, as a waiver or forfeiture of that claim under the unique circumstances of this case.

Statement of the Case

The facts of this case are undisputed and are correctly and adequately set forth in the briefs of the petitioner and of the respondent. In pertinent part, these facts may be summarized as follows:

Petitioner is a Negro. On October 21, 1952, he was indicted for the murder of a white man. Trial was held in the Superior Court of Fulton County on March 10, 1953, following which the all-white jury found petitioner guilty as charged. After a motion for new trial was overruled, petitioner appealed to the Supreme Court of Georgia. That court affirmed the conviction on October 14, 1953, finding no merit in the various assignments of error. *Williams* v. *State*, 210 Ga. 207, 78 S. E. 2d 521. The correctness of that decision is not involved in the instant case before this Court. Petitioner was thereafter (November 23, 1953) sentenced to death. (R. 16).

On December 1, 1953, petitioner filed in the Superior Court of Fulton County an extraordinary motion for new trial (R. 1) pursuant to Section 70-303 of the Georgia Code Annotated.[1] In this extraordinary motion was raised for the first time the contention that petitioner had been denied the equal protection of the state laws by reason of the circumstances attending the selection, organizing, impaneling and challenging of the jury sworn to try him—all in violation of the equal protection clause of the Fourteenth Amendment of the federal Constitution. More particularly, this motion alleged:

(1) The Fulton County jury commissioners had selected

[1] Under Georgia practice, ordinary motion for new trial must be made during the term at which trial is had but in any event within 30 days from the trial. Sec. 70-301, Georgia Code Ann. An extraordinary motion for new trial, such as was filed in this case, is one made any time after the term at which the trial is had. Sec. 70-303, Georgia Code Ann.

names of prospective trial jurors, printed the names of white persons on white tickets or slips of paper and the names of Negroes on yellow tickets or slips of paper, and placed all these tickets in the jury box, thus permitting the judge and other court officials deliberately to discriminate against Negroes in the drawing of jurors for any panel.

(2) The numerical proportion of Negroes to white persons placed on the jury panels and actually summoned for jury duty was excessively and systematically less than the proportion of Negro citizens to white citizens in Fulton County as a whole and excessively and systematically less than the proportion of Negroes to white persons whose names were placed in the jury box.

(3) More than 120 tickets were drawn from the jury box on February 18, 1953. Those whose names were thus drawn were to serve as petit jurors in both criminal and civil cases in the Superior Court of Fulton County during the week of March 9, 1953. From this number 10 panels of 12 petit jurors each were chosen; of these 120 persons only 4 were Negroes. Five of these panels were assigned to serve in criminal trials and all 4 Negroes were included in these panels. A panel of 48 of these jurors, including the 4 Negroes, were put upon petitioner. Three of the Negroes were excused for cause and the other was challenged peremptorily by the State, being the first juror thus challenged by the State. (R. 4-5).

(4) This system of selection made it possible to keep the number of Negro jurors selected for the panels within the six peremptory challenges allowed the State in any felony case and well under the ten such challenges allowed the State in a capital case.[2]

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[2] In this connection, the motion stated as follows (R. 4): "Movant shows that in the reported case of *Watkins* v. *State*, 199 Ga. 81, public speeches of the Solicitor General of another county here referred to, showing that

Attached to the motion were affidavits by the petitioner and his counsel,[3] stating that neither knew at the time of the trial on March 10, 1953, of the facts set forth in the extraordinary motion relative to the selection and impaneling of the jury panel. (R. 6-7).[4] His counsel added that such facts "could not have been discovered by him in the exercise of ordinary diligence" (R. 7).

Upon hearing, the Superior Court dismissed the extraordinary motion "for the reason that the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion" (R. 16). The matter was then duly appealed to the Supreme Court of Georgia, the petitioner contending that the case was controlled by *Avery* v. *Georgia*, 345 U. S. 559. That court affirmed the dismissal of the extraordinary motion on two grounds:

(1) The law of Georgia requires that any challenge to the array of jurors be raised at the time the array is put upon the defendant and before the trial begins. Since petitioner had failed to make his challenge at that point "the objection is waived and can not thereafter be made a ground of a motion for new trial" (R. 21).

(2) The affidavits of petitioner and his counsel to the effect that they did not know of the facts as to the selection of the jury panel at the time of the trial and could not have discovered them in the exercise of ordinary diligence were

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he by design exercised the State's peremptory challenges to prevent negro jurors from serving on the trial of any cause in his court, and that this means is known to and available to all solicitors general, and may be made effective by control of the number of negro petit jurors summoned for jury service."

[3] Although the record before this Court does not so indicate, counsel had been appointed by the trial court to represent petitioner. This appointment was apparently made in November or December, 1952.

[4] These affidavits were filed in an attempt to comply with the requirements of Section 70-205 Georgia Code Ann.

insufficient to excuse petitioner from the necessity of presenting the challenge at the time the panel was put upon him. Moreover, said the court, the statements in these affidavits are contradicted by the fact that when this case came on for trial on March 10, 1953, *Avery* v. *State*, 209 Ga. 116, 70 S. E. 2d 716, had already been decided by the Supreme Court of Georgia and was then pending in the Supreme Court of the United States. The opinion of the Georgia court in the *Avery* case had fully explained the method of selecting jury panels in Fulton County to which petitioner now objected and due diligence would have required petitioner and his counsel to make themselves familiar with such a pertinent opinion. Thus the motion for new trial was not sufficient as an extraordinary motion for new trial (R. 22).

The Georgia court admitted (R. 22) that the system of jury selection set forth in the extraordinary motion was one "which has been condemned by this court and the Supreme Court of the United States." But, added the court, any such question "must be raised at the time and in the manner required under the rules of law and practice and procedure in effect in this State" (R. 22).

Summary of Argument

1. This Court clearly has jurisdiction to determine whether the federal right asserted in the state court may be lost by waiver and whether, under the particular circumstances, a waiver has in fact occurred. *Truax* v. *Corrigan*, 257 U. S. 312; *Parker* v. *Illinois*, 333 U. S. 571. The ruling of the state court as to waiver of the federal claim is not binding on this Court. *Davis* v. *Wechsler*, 263 U. S. 22; *Patterson* v. *Alabama*, 294 U. S. 600.

2. Despite petitioner's failure to challenge the jury panel when it was put upon him, the federal constitutional claim

he now asserts should not, in the circumstances, be considered waived for purposes of the federal Constitution.

(a) In a capital case, where a life is at stake, a constitutional claim should not be considered waived for light or unsubstantial reasons. The presumption against the waiver of fundamental rights, *Glasser* v. *United States*, 315 U. S. 60, 70, is peculiarly appropriate where a condemned person claims that he has been denied the equal protection of the laws, "for equal protection to all is the basic principle upon which justice under law rests." *Pierre* v. *Louisiana*, 306 U. S. 354, 358.

(b) A constitutional claim that goes to the very essence of a fair trial and which, if proved, would render the conviction constitutionally worthless should not be considered waived or forfeited for any but the most inexcusable of reasons. A claim that there has been racial discrimination in the selection of the jury panel in a criminal case is of that nature. Discriminatory exclusions from the panel of racial groups impregnate the whole fabric of the trial and make a mockery of the concept of trial by jury. *Strauder* v. *West Virginia*, 100 U. S. 303; *Pierre* v. *Louisiana*, 306 U. S. 354. Waiver of so basic an objection should be precluded where there are extenuating circumstances of a substantial and reasonable nature surrounding a failure to take advantage of a particular corrective process afforded by the state.

(c) The circumstances surrounding the failure to make a timely challenge to the jury panel show that such a challenge would have been futile. This futility springs from the fact that the challenge would have been denied by the Georgia trial court on the then prevailing authority of the Georgia Supreme Court in *Avery* v. *State*, 209 Ga. 116, 70 S. E. 2d 716. It was not until two months later, when this Court reversed that *Avery* ruling, that it first became clear that petitioner's challenge had any substance. Such seeming futility is an ameliorating circumstance that can, in cer-

tain situations, counterbalance the failure to pursue an available remedy. *Sunal* v. *Large*, 332 U. S. 174; *Bowen* v. *Johnston*, 306 U. S. 19. This case contains sufficient ameliorating circumstances, in addition to the factor of seeming futility, to warrant the conclusion that, for purposes of the federal Constitution, no waiver occurred. *Patterson* v. *Alabama*, 294 U. S. 600.

(d) So far as the record shows, petitioner and his counsel acted at all times in good faith. Under Georgia law there is no obstacle to a consideration of the merits of petitioner's extraordinary motion for new trial at this late date.

Argument

1. *This Court has jurisdiction to determine whether there has been a waiver of the federal constitutional claim*

It is urged by the State of Georgia, respondent herein, that the writ of certiorari should be dismissed as improvidently granted. The contention is that the decision below rests upon the adequate non-federal ground that the federal constitutional claim was raised too late under the requirements of state procedure. Hence it is said that there has been no determination of a federal issue which this Court can review.

But this argument misconceives the nature of petitioner's position before this Court and the scope of this Court's jurisdiction in cases of this character. Concededly, there has been no determination by the Georgia courts of the merits of the federal question raised in petitioner's extraordinary motion for new trial. He accordingly cannot and does not ask this Court now to resolve that federal question in the first instance or to hold that the system of selecting the jury panel in his case violated his right to the equal protection of the state laws.

Petitioner does claim, however, that his constitutional claim was wrongly dismissed and that the Georgia courts

should have passed upon the merits of that claim. And what he does seek from this Court is an examination of the circumstances surrounding the assertion of the federal constitutional question, circumstances which the courts below held to constitute a waiver or forfeiture of his claim.

This Court clearly has jurisdiction to make such an examination. Time and again that jurisdiction has been acknowledged in cases coming from state courts where the claim was that a federal right set up in the state court had been wrongly denied and where the state court had put its decision on a finding that the asserted federal right had no basis in fact or had been waived or lost under state procedure.[5] In those cases, this Court has emphasized its power to go behind such state court rulings to see whether they were without substantial support. As was said in *Truax* v. *Corrigan*, 257 U.S. 312, 324, "If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

This jurisdiction has frequently been invoked to determine whether the federal right asserted in the state court may be lost by waiver and whether, under the particular circumstances, a waiver has in fact occurred. *Parker* v. *Illinois*, 333 U.S. 571, 574; *Bute* v. *Illinois*, 333 U.S. 640, 675; *Carter* v. *Illinois*, 329 U.S. 173, 174-175; *Union Pacific R. Co.* v. *Public Service Commission*, 248 U.S. 67, 69-70. The ruling of a state court that as a matter of state practice

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[5] Thus in *Rogers* v. *Alabama*, 192 U.S. 226, a motion to quash the indictment because of unlawful discrimination in the selection of the grand jury had been stricken by the state court by application of a state statute and state practice permitting the striking of unnecessarily prolix motions. This Court reexamined the facts and found that the motion was not so unreasonably prolix as to permit its withdrawal from the consideration of this Court under color of local practice. Said Mr. Justice Holmes on behalf of the Court (p. 230): "It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

and procedure an asserted federal right has been waived does not bind this Court. In such a case this tribunal is free to analyze the facts and circumstances and reach its own conclusions as to waiver. *Davis* v. *O'Hara*, 266 U.S. 314, 318; *Ward* v. *Love County*, 253 U.S. 17, 22-23. To quote the words of Mr. Justice Holmes in *Davis* v. *Wechsler*, 263 U.S. 22, 24-25:

> If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U.S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.

It follows that this Court has jurisdiction to determine whether there has been a waiver of petitioner's constitutional claim and whether the Georgia procedural rules may properly be applied to bar a determination of the merits of that claim. And the writ of certiorari, far from being improvidently granted, is an appropriate and necessary vehicle for the exercise of that important jurisdiction. Only through that writ can it be determined if petitioner has been unfairly deprived of his right to press a serious constitutional claim. See *Patterson* v. *Alabama*, 294 U.S. 600.

II. *Petitioner's constitutional claim should not be considered waived under the unique circumstances of this case*

Despite petitioner's failure to challenge the jury panel when it was put upon him, the federal constitutional claim he now asserts should not be considered waived under the

unique facts and circumstances of this case. It is unnecessary here to question the reasonableness of the Georgia rule of practice requiring that challenges to jury panels be raised before the trial begins. Nor need criticism be made of the holding of the court below that the affidavits by themselves afforded no adequate basis under Georgia law for the granting of a new trial. But there is put in issue the problem whether there are substantial and sufficient extenuating circumstances outweighing the failure to raise the federal question at the point prescribed by Georgia law so that it fairly can be said that, for purposes of the federal Constitution, there was no waiver or forfeiture of the federal claim. Such circumstances, it is submitted, do exist in this case.

Indeed, the Supreme Court of Georgia in its opinion implicitly recognized that the main problem was whether there was a valid excuse for not having raised the federal question at the point specified by Georgia practice. After first restating the requirement that jury challenges must be made before trial, the court then turned to an inquiry into the reasons given for the failure to follow that requirement. It looked to the affidavits stating that petitioner and his counsel did not know of the relevant facts at the time of the trial and could not have discovered such facts in the exercise of ordinary diligence. The court held that these statements, being mere opinion and not presenting sufficient facts to permit judgment as to whether due diligence had been exercised, were inadequate to support an extraordinary motion for new trial under Georgia law. Moreover, these statements were held to be contradicted by the "facts and circumstances." (R. 22). The "facts and circumstances" referred to involved the earlier decision of the court in *Avery* v. *State*, 209 Ga. 116, 70 S.E. 2d 716, which had set forth the pertinent facts relative to the selection of jury panels in Fulton County. Only after this inquiry into the affidavits and the surrounding "facts and circum-

stances" did the court below finally conclude that there was no error in dismissing the extraordinary motion for new trial. Only then did it finally conclude that "When this defendant failed to raise this question when the panel was put upon him, he waived the question once and for all." (R. 22).

Necessarily, had the court below believed that the reasons advanced in the affidavits or gathered from the surrounding facts and circumstances constituted adequate excuses for not challenging the jury panel when it was put upon the petitioner, relief would have been forthcoming. At least a hearing would have been ordered upon the facts alleged in the extraordinary motion for new trial. Hence it becomes incumbent upon this Court, as it was upon the court below, to examine into the facts and circumstances surrounding the failure to raise the federal question at the point specified by Georgia law to determine if, for purposes of the federal Constitution, there has been a waiver "once and for all" of the federal constitutional claim.

a. *The capital nature of this case*

It is pertinent to note preliminarily that the petitioner has been sentenced to death. If the judgment below is allowed to stand, he will forfeit his life in accordance with the sentence duly imposed upon him.

Needless to say, constitutional rights may be waived or lost as readily in a capital case as in a non-capital case by virtue of a failure to follow prescribed rules of state procedure. See *Brown* v. *Allen*, 344 U. S. 443, 485-487. But the fact that the individual's life is at stake makes it all the more important that constitutional rights be not considered waived for light or unsubstantial reasons. A human life should not be snuffed out until we are emphatically sure that all constitutional claims have been resolved or have been inexcusably waived or forfeited.

The capital nature of this case, moreover, makes peculiarly appropriate the principle stated in *Glasser* v. *United States*, 315 U. S. 60, 70, that "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." See also *Johnson* v. *Zerbst*, 304 U. S. 458, 464; *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389; *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292. Thus when an individual condemned to death claims that he has been denied the equal protection of the laws on account of his race, a waiver should not be easily presumed but should be clear and unequivocal. A court then has a solemn duty to inquire into the facts surrounding an alleged waiver of so fundamental a claim, "for equal protection to all is the basic principle upon which justice under law rests." *Pierre* v. *Louisiana*, 306 U. S. 354, 358. An accused person should not go to his death with a substantial doubt remaining as to whether "justice under law" has been accorded or waived.

b. *The substantiality of petitioner's constitutional claim*

If proved, the facts stated in petitioner's extraordinary motion for new trial establish a clear violation of his right to the equal protection of the state laws as guaranteed him by the Fourteenth Amendment. That motion sets forth facts substantially identical with those before this Court in *Avery* v. *Georgia*, 345 U. S. 559.

In the *Avery* case this Court held that the very practice complained of by the petitioner in this case—the use in Fulton County of yellow and white tickets to distinguish between white and Negro jurors—was an open invitation to practice unlawful discrimination at some stage in the jury selection process. And the fact that under such a system none of the panel of 60 jurors in the *Avery* case was a

Negro was held to establish a prima facie case of discrimination. Here there were only 4 Negroes among 120 jurors chosen, all 4 being included among the 48 jurors put upon the petitioner. In both cases the panels were drawn from a jury box that permitted easy discrimination. In one instance, no Negroes were selected; in the other, only four. In both instances a much greater percentage of Negroes was available for service and would have been selected under the mathematical laws of chance had discrimination not occurred.[6] It may fairly be said that where there is a mode of jury selection that is inherently susceptible to discrimination and abuse, as is true in this and the *Avery* cases, any substantial deviation between the proportion of Negroes chosen on the jury panels and the proportion of Negroes eligible for jury service is prima facie proof of discrimination.

The critical factor in the *Avery* case was the inherently discriminatory system of jury selection. And that factor is allegedly present in this case. As the Supreme Court of Georgia admits in its opinion below (R. 22), "Defendant in his motion sets forth a practice which has been condemned by this court and the Supreme Court of the United States.[7]

The constitutional claim thus made by the petitioner

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[6] In the *Avery* case, this Court noted (345 U.S. at 561), "The State concedes that Negroes are available for jury service in Fulton County, and we are told that Negroes generally do serve on juries in the courts of that county." The opinion of the Supreme Court of Georgia in the *Avery* case (209 Ga. at 120, 70 S.E. 2d at 720) also pointed out that: "It is a common occurrence for both white and colored jurors to serve. Five colored grand jurors served at the July-August, 1951, term of Court. An entire panel or more of colored traverse jurors sometimes serves."

[7] The brief of the state of Georgia, respondent herein, notes (p. 6) that after this Court's decision in the *Avery* case the Superior Court of Fulton County carried into effect the mandate of this Court and completely revised the jury boxes, presumably eliminating the use of yellow and white tickets.

is not a frivolous or empty one.[8] It is a claim that, if proved, affects the very essence of trial by jury and our traditional concepts of justice.[9] The right to a trial by jury for an alleged offense against the laws of Georgia is guaranteed petitioner by the Constitution of Georgia [10] and equality in the application of that constitutional provision is guaranteed petitioner by the Fourteenth Amendment.[11] Fair selection and constitution of a jury to try petitioner are essential parts of the protection that such a mode of trial is intended to secure. "The very idea of a jury," said this Court in *Strauder* v. *West Virginia*, 100 U. S. 303, 308, "is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

Once particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service "indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice." *Pierre* v. *Louisiana*, 306 U. S. 354, 358. Such a discriminatory exclusion impregnates the whole fabric of the trial and makes a mockery of the concept of trial by jury. The trial then becomes not by a jury of one's peers or equals but by a jury of one's alleged superiors who may

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[8] In view of the substantiality of the petitioner's claim based upon the use of white and yellow tickets, the significance of the claim as to discriminatory use of peremptory challenges need not be reached.

[9] "An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses." *Akins* v. *Texas*, 325 U.S. 398, 400-401.

[10] "Every person charged with an offense against the laws of this State . . . shall have a public and speedy trial by an impartial jury." Constitution of the State of Georgia, Article I, Paragraph V.

[11] And see also 18 U.S.C.A. § 243.

well be prejudiced. As this Court said in *Strauder* v. *West Virginia*, 100 U. S. 303, 309:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. . . . The framers of the constitutional Amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was, doubtless, a motive that led to the Amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided . . .

Because racial discrimination in the selection of jurors so corrodes the concept of trial by jury, a verdict rendered by a discriminatorily selected jury cannot be respected and cannot stand. It is not a verdict which the Fourteenth Amendment permits to be recognized. Accordingly, when convinced that discrimination has been proved in a particular case, this Court has unhesitatingly reversed criminal convictions regardless of the guilt of the accused. "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." *Smith* v. *Texas*, 311 U. S. 128, 132; and see *Martin* v. *Texas*, 200 U. S. 316, 319; *Carter* v. *Texas*, 177 U. S. 442, 447. The conviction itself becomes a denial of equal protection. *Smith* v. *Texas*, *supra*, 129-130.

Petitioner's claim is thus more than a procedural or technical objection. It is more than an alleged error of law. If the jury panel was in fact discriminatorily selected, the whole proceeding leading to his conviction became a

mask in constitutional theory. Cf. *Moore* v. *Dempsey*, 261 U. S. 86. The jury was so constitutionally suspect, so likely to possess the elements of prejudice, that its verdict is constitutionally defective. That verdict, which petitioner must satisfy with his life unless reversed, was a denial to him of the equal protection of the Georgia laws.

A claim that so fundamentally affects the fairness which is the major and historic characteristic of trial by jury should not be considered waived or forfeited for any but the most inexcusable of reasons. Such a basic defect in the procedure leading to the execution of petitioner is not easily overlooked merely because petitioner failed to follow a rule of state practice, however reasonable that rule. Perfection in the state's machinery for correcting constitutional faults does not alone cure a faulty trial and conviction. Nor does the failure of the accused to take advantage of that machinery cause the evaporation of the poison of prejudice which presumably saturated the trial and verdict by virtue of the alleged discrimination. Only if the failure to take advantage of a particular corrective process is intentional, in bad faith or inexcusable, and is not outweighed by any substantial extenuating circumstances, should a waiver or forfeiture be permitted. There was no such failure in this instance and hence, for purposes of the federal Constitution, there was no waiver.

The constitutional command of equal protection is strong. In a capital case it is not easily waived. Only the most compelling of circumstances should permit the conclusion that an individual has in effect waived all objection to the deprivation of his life by a process which denied him the equal protection of the laws and which rendered his conviction constitutionally worthless. The right to a *fair* trial by jury, which Blackstone called "the grand bulwark" of our liberties, is too precious to be considered waived for any technical or slight reason.

c. The futility of a timely challenge

The particular circumstances surrounding petitioner's failure to challenge the jury panel at the point required by Georgia law reveal the significant and substantial fact that a challenge at that particular point would have been fruitless. This futility springs from the certainty that a challenge at the appropriate time—i.e., when the panel was put upon the petitioner just prior to the trial on March 10, 1953—would have been denied on the authority of the then prevailing decision of the Supreme Court of Georgia in *Avery* v. *State*, 209 Ga. 116, 70 S. E. 2d 716.

The situation as it existed on March 10, 1953, can best be illustrated by a comparative chronology of events in the *Avery* case and the instant case:

Avery case	*Williams* case
April 14, 1952 — Georgia Supreme Court decision holding that the practice of using white and yellow tickets in Fulton County was prima facie evidence of discrimination but, in absence of proof of actual discrimination in drawing the challenged jurors, "furnished no sufficient objection to the jurors challenged by the accused." 209 Ga. 116, 70 S.E. 2d 716.	
July 28, 1952 — petition for writ of certiorari filed in United States Supreme Court.	
	October 21, 1952—indictment returned, charging petitioner with crime of murder.

Avery case

March 9, 1953 — writ of certiorari granted by United States Supreme Court.

April 30, 1953 — oral argument of case before United States Supreme Court.

May 25, 1953 — opinion of United States Supreme Court reversing Georgia court and holding that *practice of using white* and yellow tickets, when combined with absence of Negroes on particular panel, established a prima facie case of discrimination which was sufficient unless rebutted by the State. 345 U.S. 559.

Williams case

March 10, 1953—panel of 48 jurors put upon petitioner, at which point he should have challenged panel under Georgia law; trial and conviction immediately followed.

June 29, 1953 — amendment to motion for new trial filed, which did not mention constitutional claim concerning selection of jury panel.

October 14, 1953—conviction affirmed by Georgia Supreme Court, constitutional claim not being involved or decided. 210 Ga. 207, 78 S.E. 2d 521.

Williams case	*Avery* case
	November 23, 1953—defendant sentenced to death.
	December 1, 1953 — extraordinary motion for new trial filed in trial court, raising for first time the constitutional issue as to discriminatory method of selecting jury panel.
	January 18, 1954 — extraordinary motion for new trial dismissed by trial court since it "did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion."
	May 19, 1954—affirmance of dismissal of extraordinary motion, the Georgia Supreme Court holding that the constitutional issue should have been raised before trial on March 10, 1953. 210 Ga. 665, 82 S.E. 2d 217.

Thus on March 10, 1953, a trial judge of the Superior Court of Fulton County would have been obliged to follow and apply the ruling of the Supreme Court of Georgia in the *Avery* case. The fact that the *Avery* case was then pending on certiorari in this Court, the writ having been granted on the previous day, did not make that Georgia decision any less applicable for an inferior Georgia court on March 10, 1953. Nor was that decision drained of relevance on that particular day because it was subsequently reversed by this Court.

Assuming, as we must, that any challenge petitioner might have presented on March 10, 1953, would have been the same as that now embodied in his extraordinary motion for new trial, a dismissal of the challenge would have been certain. Petitioner's claim contains no offer of proof beyond what was proved or offered in the *Avery* case. Petitioner here, in the words of the Georgia court in the *Avery* case, has "not charged or contended that any discrimination was practiced in drawing the challenged jurors." Accordingly, the Georgia court's conclusion in the *Avery* case would have followed: "Therefore, the practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance, and consequently furnished no sufficient objection to the jurors challenged by the accused." 209 Ga. at 124, 70 S.E. 2d at 722.

It was not until more than two months later, on May 25, 1953, when this Court reversed the Georgia ruling in the *Avery* case, that it became clear for the first time that Avery's challenge and hence petitioner's claim constituted a sufficient objection. Then only would a Georgia trial judge have been obliged to disregard the ruling of the Supreme Court of Georgia in the *Avery* case and to hold that a challenge similar to that made by Avery was sufficient and, if proved and not adequately rebutted, established a prima facie case of discrimination. But by that time the opportunity for filing such a challenge in petitioner's case had lapsed under state procedure. Application of the state rule requiring challenges to be made before trial would have barred any challenge made by petitioner for the first time after the *Avery* ruling of this Court on May 25, 1953—whether by way of a motion for new trial,[12] an appeal from the conviction to

[12] Respondent's brief in opposition to the petition for certiorari suggests (pp. 5-6) that the extraordinary motion for new trial was defective in that it failed to allege that the facts sought to be raised therein were unknown to petitioner at the time of filing the amendment to the original

the Supreme Court of Georgia, or an extraordinary motion for new trial.

The statement of the court below that petitioner's counsel, in the exercise of ordinary diligence, should have known of the *Avery* ruling of that court and all the facts therein set forth need not be questioned. Even had he actually known of that ruling and even had he presented the challenge at the proper time, the challenge would have been futile. True, he could and doubtless should have raised the challenge anyway and preserved the point for purposes of appeal. But the important fact is that the challenge, if made on March 10, 1953, would have been denied under the Georgia law as it then stood and any lawyer who knew or should have known of the *Avery* decision of the Georgia court also knew or should have known of the futility of such a challenge on that day.

The seeming futility of taking a procedural step and raising an issue that is certain to be dismissed is an ameliorating circumstance that can, in certain situations, counterbalance the failure to pursue an available remedy. Thus in *Sunal* v. *Large*, 332 U.S. 174, the defendants had failed to appeal their convictions because the prevailing climate of opinion in the appellate courts seemed to foreclose any possible recognition of their claimed right to offer certain evidence at their criminal trials. This Court refused to permit them to raise the issue in later habeas corpus proceedings despite the fact that an intervening decision of the Court in another case had demonstrated the merit of the defendants' claim. The Court applied the normal rule that "since they

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motion for new trial on June 29, 1953. Aside from the fact that the Supreme Court of Georgia did not base its decision on such a point, it is obvious that had petitioner raised the constitutional objection in the original motion for new trial the effort would have been held to be too late under Georgia practice. The central issue remains whether there is an excuse, for purposes of the Federal Constitution, for not having raised the objection before trial on March 10, 1953.

chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." (332 U.S. at 181). But the opinion was careful to point out that the error claimed by the defendants "does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." (332 U.S. at 182). In other words, had the claim of the defendants been that some constitutional right of theirs had been invaded the seeming futility of appealing their convictions might well have been considered a sufficient excuse, thereby permitting the issue to be raised at a later point and avoiding a miscarriage of justice.

And in *Bowen* v. *Johnston*, 306 U.S. 19, the "uncertainty and confusion . . . whether offenses within the . . . National Park are triable in the state or federal courts" were held to be "exceptional circumstances" surrounding the failure to appeal a conviction. A subsequent raising of this jurisdictional issue was accordingly permitted in a habeas corpus proceeding. See also *Hans Nielsen, Petitioner*, 131 U.S. 176; *Ex parte Wilson*, 114 U.S. 417; *Ex parte Bain*, 121 U.S. 1; *Callan* v. *Wilson*, 127 U.S. 540; *Johnson* v. *Zerbst*, 304 U.S. 458, 463, 468; *Walker* v. *Johnston*, 312 U.S. 275.

It thus is clear that the seeming futility of raising a constitutional claim at a particular point can serve as an extenuating circumstance and can be extraordinary enough in nature to preclude a finding of irrevocable waiver. Recognition of the factor of futility in such a situation is not condonation of the failure to pursue the proper procedural step. Rather it is an acknowledgment that certain constitutional commands may on occasion require something more than an application of state rules of procedure. It is part of the process of exercising this Court's appellate jurisdiction to make sure that miscarriages of justice do not occur in the name of the federal Constitution. As was said in *Patterson* v. *Alabama*, 294 U. S. 600, 607, "We have fre-

quently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires."

And so in this case we can put to one side the undeniable fact that petitioner and his counsel failed to challenge the jury panel put upon petitioner on the day of his trial. Under Georgia law, that failure constituted a waiver of any challenge. But whether such a waiver should be recognized for purposes of the federal Constitution is quite another matter, at least where the so-called waiver occurs under exceptional circumstances. The decision in *Patterson* v. *Alabama*, *supra*, illuminates this situation. There the Court felt bound to follow the ruling of the Alabama court that the petitioner had filed his motion for new trial and bill of exceptions too late under state law to permit that court to inquire into the federal constitutional issue as to the exclusion of Negroes from the grand and petit juries. But, said the Court (294 U. S. at 605), "While we must have proper regard to this ruling of the state court in regard to its own appellate procedure, we cannot ignore the exceptional features of the present case. An important question under the Federal Constitution was involved, and, from that standpoint, the case did not stand alone." The Court then went on to examine other exceptional features in the case, including the fact that the Court had just reversed the Alabama court in a companion case involving precisely the same issue. As a result, this Court remanded the *Patterson* case to the Alabama court so that it might reexamine the matter in light of the new situation.[13]

The parallel between the *Patterson* case and the instant one is striking. In both cases the petitioner was sentenced

[13] On remand, the Alabama court quashed the indictment against Patterson. Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 Univ. of Chicago L. Rev. 266, 270 (1946).

to death. In both cases the petitioner raised a serious constitutional issue involving the exclusion of Negroes from the jury panel, an issue that goes to the very essence of a fair trial and our basic concepts of justice. In the *Patterson* case the issue was held to have been waived in the state appellate court because of a failure to file a motion for new trial and a bill of exceptions in time. Here the issue was held to have been waived for failure to raise it at the point the jury panel was put upon petitioner. The exceptional circumstances that were found to counterbalance the waiver in the *Patterson* case were the importance of the federal issue and the fact that the Court had just reversed judgment in a companion case which shared the same record and raised the same issue.

The exceptional circumstances present here are certainly no less compelling than in the *Patterson* case. Until this Court rendered its decision in the *Avery* case, raising petitioner's objection to the jury panel seemed a futile and useless gesture. At the point petitioner should have raised the issue under state procedure, he could not have received any relief on the basis of the then prevailing law. The trial judge would have had to act without the benefit of this Court's ruling in the *Avery* case. Had such a timely objection been made, therefore, it would have been dismissed; trial and conviction would have followed; and an appeal renewing the federal question could have been made. If the case came to this Court in that posture, realistically the situation would be indistinguishable from what it is now—i.e., this Court would be faced with the problem of whether, after a trial and conviction, a hearing should now be had on the merits of the challenge to the jury panel. Obedience to the command of equal protection requires such a hearing in the present posture of the case.

Under the unique circumstances of this case, the federal question should not be considered waived. The constitu-

tional principle of equal protection is too important to be lost in the confusion that naturally attended the long course of litigious development of the *Avery* case.

d. *Practical considerations*

It is also relevant to note that there is no indication in the record or in the opinion below that petitioner or his counsel deliberately falsified their affidavits. So far as the record shows, their statements that they did not know of the facts regarding the selection of the jury panel were made in good faith. Nor is there any basis for inferring that petitioner or his counsel is seeking to utilize dilatory tactics by deferring the constitutional issue until after other issues have been exhausted. And permitting a determination of that federal issue at this point will be no more upsetting of state procedure than had the issue been timely raised, denied and pursued on appeal.

Moreover, there are no jurisdictional hurdles confronting a determination of the merits of petitioner's constitutional claim by the Georgia courts at this late date. Under Georgia law, an extraordinary motion for new trial is addressed to the sound discretion of the trial judge, whose judgment will not be disturbed except for an abuse of discretion. *Parks* v. *State*, 204 Ga. 41, 46, 48 S. E. 2d 837. And a state statute (Georgia Code Ann., Sec. 70-208) explicitly provides that in all applications for a new trial on grounds not specified in the code the presiding judge must exercise a sound legal discretion in granting or refusing the same "according to the provisions of the common law and practice of the courts." Indeed, the opinion of the court below, by inquiring into the reasons advanced for the failure to make a timely challenge, necessarily recognizes the appropriateness of the extraordinary motion under these circumstances.

There do not appear to have been any prior Georgia cases involving an effort to secure a new trial on the basis of

an issue waived under state but not federal law. But if this Court sees fit to hold that, for purposes of the federal Constitution, there has been no waiver, the Georgia courts would then be exercising their normal jurisdiction over extraordinary motions for new trial, a jurisdiction that is always subject to the superior demands of the federal Constitution. And there are relevant federal cases holding that, in the exercise of discretion, a trial judge may grant a new trial if convinced of a harmful error even though no exception or objection as to the point in question was made at the original trial. *United States* v. *340 Acres of Land*, 54 F. Supp. 457 (S.D. Ga.); *United States* v. *Trollinger*, 81 F. 2d 167 (C.C.A. 4).

Conclusion

For the foregoing reasons, the conclusion follows that petitioner has not waived his claim under the equal protection clause of the Fourteenth Amendment. Even though the failure to challenge the jury panel before trial constituted a waiver under Georgia law, the unique circumstances of this case require that, for purposes of the federal Constitution, such waiver not be recognized.

The judgment below should accordingly be reversed and the case remanded to the Superior Court of Fulton County so that a hearing may be had on the merits of petitioner's extraordinary motion for new trial.

Respectfully submitted,

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Petitioner by invitation of
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APRIL, 1955.

APPENDIX

1. Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Constitution of the State of Georgia, Article I, Paragraph V:

> Every person charged with an offense against the laws of this State . . . shall have a public and speedy trial by an impartial jury.

3. Georgia Code Annotated, Section 59-801:

> *Panel of 48 jurors in felony trials; tales jurors.* When any person shall stand indicted for a felony, the court shall have impaneled 48 jurors, 24 of whom shall be taken from the two panels of petit jurors, from which to select the jury . . .

4. Georgia Code Annotated, Section 59-802:

> *Putting panel on prisoner.* The clerk shall make out three lists of each panel, and furnish one to the prosecuting counsel, and one to the counsel for the defense. The clerk shall then call over the panel, and it shall be immediately put upon the accused.

5. Georgia Code Annotated, Section 59-803:

Challenge to the array. The accused may, in writing challenge the array for any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at one. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed.

6. Georgia Code Annotated, Section 59-805:

Peremptory challenges, number. Every person indicted for a crime or offense which may subject him to death or imprisonment in the penitentiary for not less than four years may peremptorily challenge 20 of the jurors impaneled to try him, and every person indicted for an offense which may subject him to imprisonment in the penitentiary for any time less than four years may peremptorily challenge 12 of the jurors impaneled to try him; and the State shall be allowed one-half the number of peremptory challenges allowed to the prisoner.

7. Georgia Code Annotated, Section 70-204:

Newly-discovered evidence. A new trial may be granted in all cases when any material evidence, not merely cumulative or impeaching in its character, but relating to new and material facts, shall be discovered by the applicant after the rendition of a verdict against him, and shall be brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial.

8. Georgia Code Annotated, Section 70-205:

Same; affidavit of movant; contents. When a motion for new trial is made on the ground of newly-dis-

covered evidence, it must appear by affidavit of the movant and each of his counsel that they did not know of the existence of such evidence before the trial, and that the same could not have been discovered by the exercise of ordinary diligence . . .

9. Georgia Code Annotated, Section 70-208:

Grant on other grounds; exercise of discretion by court. In all applications for a new trial on other grounds, not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts.

10. Georgia Code Annotated, Section 70-301:

Time of application; hearing, etc., in vacation; brief of evidence. All applications for a new trial, except in extraordinary cases, shall be made during the term at which the trial was had; and when the term shall continue longer than 30 days, the application shall be filed within 30 days from the trial, together with a brief of evidence, subject to the approval of the judge and subject to the right of amendment allowed in applications for a new trial; but all applications herein provided for may be heard, determined, and returned in vacation.

11. Georgia Code Annotated, Section 70-303:

Motion made after adjournment of court. In case of a motion for a new trial made after the adjournment of the court, some good reason must be shown why the motion was not made during the term, which shall be judged of by the court. In all such cases, 20 days' notice shall be given to the opposite party. When-

ever a motion for a new trial shall have been made at the term of trial in any criminal case and overruled, or when a motion for a new trial has not been made at such term, no motion for a new trial from the same verdict shall be made or received, unless the same is an extraordinary motion or case, and but one such extraordinary motion shall be made or allowed.

(1201-3)